In the United States Court of Appeal, for the Ninth Circuit

Lawrence E. Wilson, Warden, California State Prison, San Quentin, California, Appellant	X X X X X	
v.	X	No. 22,569
William J. Bowie, Appellee	X X X	

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

This is an appeal by the State from an order of the United States District Court for the Northern District of California granting appellee's petition for a writ of habeas corpus brought to test the validity of his detention by the warden of San Quentin Prison. A copy of the order and opinion are attached as Exhibit A.

EARLIER PROCEEDINGS

On January 18, 1966, the District Court denied petitioner-appellee's petition for a writ of habeas corpus. On February 15, 1967, this Court (in No. 20,846) vacated the District Court's order to allow petitioner to exhaust state remedies. The California Supreme Court denied appellee's petition for a writ of habeas corpus and the case was restored to the District Court calendar, and submitted there on the trial record, petition and memorandum filed with the California Supreme Court and

the earlier memorandum and brief of the State.

Earlier proceedings are listed in the petition (p. 3, ls. 12-23). In none of these prior proceedings was petitioner-appellee represented by counsel except at the preliminary hearing and in the appeal following conviction (200 Cal. App. (2d) 291).

The petition before the District Court alleged that appellee was detained in San Quentin Prison and that the detention was illegal because at a trial at which he had been convicted of a violation of California Penal Code §245 (assault with a deadly weapon) he was denied his rights to counsel; to cross-examine and confront witnesses; to be warned that he need not testify; and to have excluded from the trial incriminating statements made after arrest and in response to police questioning. The petition further alleged that the entire prosecution "was permeated with such unfairness as to call into question the very integrity of the fact-finding process" (petition, p. 2, ls. 19-21).

On November 16, 1967, the District Court entered an Order Granting Petition for Writ of Habeas Corpus on the grounds (1) that petitioner had been denied the right to confront and cross-examine Peter Coletsos, "the putative victim of one of petitioner's alleged assaults"; and (2) that the trial judge had failed to warn him of his right not to take the stand in violation of his constitutional rights. The District Court reserved judgment on the "close questions" whether petitioner

had been denied the right to counsel and whether involuntary confessions had been admitted against him.

A certificate of probable cause to appeal and an order staying judgment on appeal were issued. On December 5, 1967, respondent-appellant filed a notice of appeal.

Appellee's application pro se for release on his own recognizance was at first denied by this Court on March 8, 1968, and then on June 4, 1968, a renewed motion filed by counsel for release on his own recognizance, which was unopposed, was granted and appellee was released on his own recognizance.

JURISDICTION

The jurisdiction of this Court is conferred by Title 28 U.S. Code §2253.

STATEMENT OF FACTS

Petitioner was arrested in a San Francisco hotel on the night of December 3, 1960, while engaged in a fight with one Peter Coletsos. At the same time, petitioner's wife, Irene Bowie, lay stabbed in a room in the same hotel.

Petitioner was charged with two counts of violation of §217 of the California Penal Code (assault with intent to commit murder), one count each as to Coletsos and Mrs. Bowie.

He was represented at the preliminary examination by the Public Defender. At the trial in Superior Court, he represented himself. At the trial, the transcript of the preliminary examination was admitted into evidence under circumstances which will be set forth hereafter.

Coletsos and Mrs. Bowie testified at the preliminary examination; neither appeared at the trial.

At the preliminary examination, Coletsos testified that he had never seen petitioner before and that he was not acquainted with Mrs. Bowie (R.T. p. 8, ls. 25-26; p. 10, l. 15, ls. 22-24); that petitioner, without provocation of any kind, came to him in the hotel hallway, began quarreling with him, and kicked at him (R.T. p. 25, ls. 4-13). Then, he testified, he went to his room and obtained a hammer to "have something to protect myself" (R.T. p. 12, ls. 12-20; p. 15, ls. 11-25; p. 18, ls. 1-5), and then he went downstairs (R.T. p. 8, l. 18). Coletsos further testified that thereafter petitioner went to his room and "got something else and came down after me." (R.T. p. 13, ls. 11-12.)

The two men fought in the lobby, Coletsos armed with his hammer and petitioner with a knife. (R.T. p. 15, ls. 3-18.) It cannot be ascertained from Coletsos' testimony how he knew that petitioner had gone to his room if, as he testified, he had preceded petitioner downstairs to the hotel lobby.

Mrs. Bowie testified that on the night in question petitioner had been taking pills for headache and had been drinking, thatthe pills and the liquor together caused him to "blackout", and that he had had a number of such "blackouts". (R.T. p. 20, ls. 2-10; p. 22, ls. 6-16.) She testified that she could not stand another such seizure, that she had "made a

vow" to commit suicide if petitioner had another blackout, and that she had stabbed herself with a Marine bayonet. (R.T. p.20, ls. 2-5, p. 14, ls. 14-26.) She testified that she had told police officers that petitioner had stabbed her because she feared "being put in the San Francisco General Hospital where they put would-be suicides." (R.T. p. 21, ls. 2-12.) At the conclusion of her testimony, the Judge stated to her, "I want you to know that I don't believe one word you said." (R.T. p.23, l. 9.)

Officer Finnegan testified that, when he arrived at the hotel, he saw petitioner make a slashing motion toward Coletsos and that petitioner had a pocket-knife in his hand. (R.T. p. 24, ls. 6-8.) Four officers handcuffed him while "he was cursing and screaming." (R.T. p. 24, ls. 24-25.) In response to the officers' questions immediately following his arrest and later in the police station, petitioner said, "I would have killed him if you had not stopped me," and "I wish I could have killed you guys, too." He also said he stabbed his wife because "she wouldn't let me sleep." (R.T. p.25, ls. 2-23.) The police did not inform petitioner of his right to counsel or of his right to remain silent. (Ibid.) The officer testified that during a very brief conversation with Mrs. Bowie, as she lay wounded in the hotel room, she asked, "How is Bill?" (R.T. p. 28, ls. 13-20.)

Petitioner was held to answer. Following is the entire transcript of the arraignment procedure in Superior Court (A.R.T. pp. 1-3):

"Wednesday, January 11, 1961

The Clerk: William Bowie, for arraignment.
Come right over here. Do you have an attorney or money to hire an attorney?
The Defendant: No, sir, I wish to exercise my constitutional prerogative, if I may, and act as my own counsel, sir.
The Clerk: Here's a copy of the Information.
The Defendant: At this time I wish to plead not guilty, your Honor.
The Clerk: You have to be arraigned first.
The Defendant: Sir?
The Clerk: William Bowie--Is that the way you pronounce your name?
The Defendant: Bowie.
The Clerk: William Bowie, you are charged in an Information with the crime of felony, assault with a deadly weapon with intent to commit murder, in two counts. Is that your true name, William Bowie?
The Defendant: Right.
The Clerk: Waive reading of the Information?
The Defendant: I wish to waive, yeah.
The Clerk: Are you ready to plead at this time?
The Defendant: I wish to enter a plea of not guilty.
The Clerk: To each count?
The Defendant: Not guilty.
I do not wish to waive time.
The Court: You want an early trial, do you?
The Defendant: The earliest possible date your Honor can find ample time to present the evidence for judgment to your Court.
The Court: I assume you want a jury trial, do you?
The Defendant: Well, a jury trial would be next in line after the Court's judgment here. I'd prefer to have it heard in Superior Court because I believe that it can be brought down from where it stands at the present time.
The Court: I mean do you want a jury trial, or do you want the Court to hear your case? You're entitled to a jury trial, if you want it.
The Defendant: I will take a jury trial, then, your Honor.
The Court: Very well.
The Defendant: And I pray the Court's indulgence at this time, then, in view of that, to remain here at the County Jail, if I may, instead of going down to Bruno, as I would be asking the

Public Defender's office for legal advice, and so forth, and there would be the subpoenaing of records that I should like to have.

The Court: I have no control over the jail. I have no control over that. It's up to them.

Mr. Bowie: Well, your Honor, under the circumstances, would I be entitled to the facilities of the Public Defender's office?

The Court: I think you should accept the Public Defender's office right now. That's my advice to you.

The Defendant: Your Honor, with all due respect to the Court, without seeming to be pretentious or obstinate, I realize the Public Defender's office has been rather pressed for time. My experience in the past did not give them the time to look into my case or give me proper representation. I would be happy to coordinate with the Public Defender's office.

The Court: All right, let's set it for trial.

Mr. Maurer: February 9th, your Honor?

The Court: February 9th.

The Defendant: Thank you, your Honor."

At the petitioner's request, the case was advanced from February 9th to January 13, 1961, and the following colloquy occurred when the case was called on January 13th:

"The Defendant: At this time, your Honor, after due thought and consideration, I would like to waive the jury trial, submit myself to the judgment of this Court at the earliest possible trial date, if I may.

The Court: You want to waive a jury trial, is that it?

The Defendant: Yes, sir.

The Clerk: Consent to that?

Mr. Maurer: (prosecutor) Yes, the People consent.

The Court: All right, what date?

Mr. Maurer: Would you want to submit the matter on the transcript?

Mr. Dresow: [Public Defender] Oh, don't take advantage of him that way. He doesn't understand that. Why don't you set it down for the 20th, Friday, the 20th? He doesn't understand that. Let the Court--

The Court: Why don't you, why don't you let the Public Defender--

Mr. Dresow: We don't want him, Judge, but I don't want him taken advantage of.
The Court: Why don't you let him help you on this matter? You're waiving a jury trial, and we're putting it down for--
Mr. Maurer: February 20th.
Mr. Dresow: January 20th.
The Court: You talk to the District Attorney."
(R.T. p. 1, l. 4 to p. 2, l. 7.

On January 20th, the proceedings began as follows:

"The Clerk: The matter of William Bowie, for decision. He had waived a jury trial and submitted it on the transcript.
The Defendant: Yes.
The Clerk: We haven't received that transcript.
The Court: He didn't receive it?
The Clerk: Fitzgerald Ames--
The Court: He never received it?
The Defendant: I don't know--they were over there when I gave it to--
The Clerk: He's got it.
The Court: Oh, he has it?
You want a hearing now, is that right?
The Defendant: Yes.
(The transcript of the preliminary hearing was received, reading as follows:) . . ."
(R.T. p. 5.)

After the transcript was received, the following colloquy occurred:

"The Court: All right. Call the witnesses. You sit right at the counsel table.
Mr. Floyd: [Prosecutor] In any case, the matter was submitted on the transcript.
The Court: Did you submit the case on the transcript? Did you intend that I read this transcript and make a decision from that, or did you want to testify?
The Defendant: Your Honor, I want the witnesses present, with the Court's approval, to question them, to have the privilege of cross-examining them, and let the Court decide the matter after that.
The Court: Very well."
(R.T. p. 31, ls. 1-12.)

The Prosecutor, Mr. Floyd, then called Officer Finnegan, who repeated in substance his testimony at the preliminary examination (R.T. p. 31, l. 15-p. 40, l. 26).

The second witness was Officer Mulligan, who testified that when he arrived at the hotel, other officers "already had [petitioner] on the floor. . . ." (R.T. p. 42, ls. 12-13). Officer Mulligan participated in questioning petitioner "outside the hotel, waiting for the patrol wagon, and then again in the cell inside when we had him in the station." (R.T. p. 4, ls. 23-25.) He testified that petitioner "said he wished he had killed the main he had stabbed and he'd like to have gotten one officer also." (R.T. p. 43, ls. 11-13.) At the conclusion of Officer Mulligan's testimony, the following occurred:

> "Mr. Floyd: We attempted to subpoena Mr. Coletsos, your Honor. He's not in Court this morning.
> The Court: You want to testify, don't you?
> The Defendant: I do, your Honor.
> The Court: All right.
> William J. Bowie,
> the Defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:
> The Court: All right, you just tell us your story.
> The Defendant: May I read it from my transcript, your Honor?
> The Court: Very well."
> (R.T. p. 44, l. 22-p. 45, l. 7.)

Petitioner then testified, apparently from a prepared statement, since he had not previously testified and there was no "transcript." He said that on the night in question he had

drunk two bottles of wine and had begun on a third, that his wife had told him "some damn Dago had insulted her," and that his emotional reaction, due to a terrific headache, together with numerous aspirin pills and the wine, caused him to become "disoriented" so that his memory of the events that followed was not clear (R.T. p. 45, l. 26 to p. 46, l. 16).

The trial judge interrupted his narrative to inquire as to the trouble with his head and whether he did things when suffering such a seizure that "you should not do." (R.T. p. 26, ls. 17-24.) Petitioner replied that he did do such things, that liquor increased the pain in his head and that he could not tolerate it (R.T. p. 46, l. 25 to p. 47, l. 9).

The trial judge then inquired, "Have you been in any other trouble?" (R.T. p. 47, l. 10.) Petitioner replied that he had received one year's probation on a forgery charge but had never been "in trouble or . . . anything of violence." (R.T. p. 47, ls. 11-22.)

Following a discussion between the Judge and the prosecutor concerning the forgery charge, the judge said to petitioner, "You might have killed your wife. You didn't intend to do that, did you?" (R.T. p. 48, ls. 18-23.) The judge then asked, "What do you think we should do for you for your protection?" (R.T. p. 48, ls. 24-25.) Petitioner, without replying, resumed his narrative statement.

In summary, he testified that Coletsos kicked and banged on his door, he opened it and was immediately attacked,

that Coletsos then left and returned very shortly with a hammer and renewed the attack, and that he had never seen Coletsos before. He testified further that Coletsos eventually went downstairs and that when he re-entered his room, he found his wife bleeding. He ran downstairs for help and remembered nothing thereafter until he found himself in handcuffs outside the hotel. He had no memory of ever having a knife in his hand (R.T. p. 50, l. 3 to p. 51, l. 13).

Immediately following the conclusion of petitioner's testimony, the trial court found him guilty of one count of violation of California Penal Code §245 (assault with a deadly weapon), a lesser offense included in the original charge. The conviction was as to the assault on Coletsos; he was found not guilty as to the other charge with respect to his wife.

QUESTIONS PRESENTED

I. Whether at the trial the admission into evidence of the transcript of the preliminary examination violated appellee's right to confront and cross-examine the witness against him.

II. Whether appellee was denied due process in that he was permitted by the trial judge to give incriminating testimony without being warned of his right not to testify.

III. Whether the entire proceeding from the arrest to the conviction was permeated with such unfairness as to call into question the very integrity of the fact-finding process and thus to require a finding that appellee was deprived of due process of law.

ARGUMENT

I.

The Admission at the Trial of the Preliminary-Hearing Transcript Violated Appellee's Right to Confront and Cross-Examine the Witness Against Him.

1. This case is controlled by Barber v. Page.

On April 23, 1968, the United States Supreme Court decided the case of Barber v. Page, ____U.S. _____, 88 S. Ct. 1318, 36 L.W. 4329, which controls this case.

Barber, like this case, involved an appeal through federal habeas corpus on the question of whether a preliminary hearing transcript could, consistent with the Sixth and Fourteenth Amendments, be used against a defendant in a state criminal prosecution when the witness at that hearing was not produced at trial and where the state had made no substantial effort to obtain his presence. In a unanimous opinion, the Supreme Court held that such testimony could not be admitted without violating petitioner's right to confront and cross-examine his accusers.

The Court decided that, while there may be an exception permitting the introduction at trial of testimony of a witness who cannot be produced at trial, "a witness is not 'unavailable' for the purpose of the foregoing exception to the confrontation requirement unless the prosecutional authorities have made a good faith effort to obtain his presence at trial."

Barber v. Page, supra, 88 S. Ct. at 1322, 36 L.W. at 4330

In so holding, the Court said:

> "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of testimony at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case."

Barber v. Page, supra, 88 S. Ct. at 1322, 36 L. W. at 4331.

Nor is this such a case. Before former testimony of a witness alleged to be unavailable can be introduced, the State must make a showing of good faith or due diligence in attempting to produce him.

Penal Code §686(3);

Barber v. Page, supra;

People v. Ward (1895) 105 Cal. 652, 656;

People v. Redston (1956) 139 Cal. App. (2d) 485.

In Barber , the State at least located the witness in a federal prison outside the State of trial. Here, even that effort was not made. Mere issuance of a subpoena without some further showing of actual unavailability does not satisfy the Sixth and Fourteenth Amendments.

Holman v. Washington (CA 5, 1960) 364 F.(2d) 618, 623

As the District Court in this case pointed out

(Op. p. 3) and as the trial transcript makes clear (R.T.44-45), no attempt was made at trial to explore and no explanation was given as to why the witness was unavailable, nor was there any showing that a continuance would not have secured his presence. "The constitutional right to confrontation and cross-examination . . . cannot be sidestepped because it happens to be convenient for one of the parties."

Holman v. Washington, supra, 364 F.(2d) at 623.

2. The transcript was considered by the trial court and its use was prejudicial.

Appellant's brief completely ignores the effect of Barber v. Page, supra, on this appeal, arguing instead that the preliminary hearing transcript was not considered by the trial court and that even without the transcript there was sufficient other evidence to convict. Neither contention can be sustained.

A. The Transcript Was Read and Considered.

Appellant's argument that the preliminary hearing transcript was not considered by the trial court is made in the face of (1) the clear language in the trial transcript that, "The transcript of the preliminary hearing was received, reading as follows: . . ." (R.T. 5, after which the entire preliminary hearing transcript is set out); (2) the Clerk's statement (not supported by the prior record) that "[Mr. Bowie] had waived a jury trial and submitted it on the transcript" (R.T. 5); and (3) an earlier decision by the California Court of Appeals upholding

the contention the State was then making that "the [preliminary hearing] transcript was admitted . . ." People v. Bowie, (1962) 200 Cal. App. (2d) 291, 293, 294.

It was, of course, the duty of the trial court to read the transcript. The argument that it was not read "could have validity only if it was shown affirmatively by the record that the court had neglected to read the transcript. It is as unreasonable to argue that the court did not read the transcript as it would be to make the bland assertion that the court did not pay attention to the testimony of the witnesses."

People v. Heath (1955) 131 Cal. App. (2d) 172, 174;

People v. Chamberlain (1966) 242 Cal. App. (2d) 594, 597;

C.C.P. §1963(15).

The facts argued in appellant's brief fall far short of the "affirmative showing" which it is required to make. Upon analysis, appellant's argument consists wholly of highly ambiguous transcript references which, at best, leave open such questions as who had copies of the transcript at the outset of trial (R.T. 5) and whether the trial was at any point continued from January 20th to January 27, 1961. (See R.T. 5, where date of trial is indicated as January 20th, and R.T. 55, where January 27th is indicated as the then current date.) Certainly these reference do not "amply demonstrate," as appellant asserts (Brief of Appellant, p. 12) that the trial judge "totally disregarded the transcript of the preliminary hearing."

In fact, while there is no evidence that the transcript was not considered, there are several indications that it was. For example, the trial judge found respondent not guilty on the charge relating to his wife. It is incredible that he did so without reading the evidence relating to that charge, and particularly the wife's own testimony at the preliminary hearing that she had stabbed herself (R.T. 19). Moreover, respondent utilized the transcript to cross-examine witnesses (R. T. 39,40). On one occasion, when respondent attempted to cross-examine Officer Finnegan on the basis of a page reference to Coletsos' prior testimony, the Court pointed out,". . . I don't think this officer knows very much about this," indicating at least a familiarity with the transcript (R.T. 39).

B. Its Use Was Prejudicial.

The State's contention that there is sufficient other evidence to convict without the preliminary hearing transcript depends upon the argument that the transcript was not admitted or considered by the trial court. If the transcript was considered, its use was clearly prejudicial and material and constituted reversible error regardless of the other evidence. "[B]efore a federal constitutional error can be declared harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. "

Chapman v. California (1967)
386 U.S. 18, 24.

Since the transcript contained, among other things, the testimony

of the alleged victim, who was the chief witness against the accused, its consideration by the trial court was harmful.

> "The primary object of the [Sixth Amendment right of confrontation and cross-examination] was to prevent depositions or ex-parte affidavits . . . being used against the prisoner, in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand, and the manner in which he gives his testimony, whether he is worthy of belief."
>
> Mattox v. U.S. (1894) 156 U.S. 327, 242-3, 15 S. Ct. 337, 339;
>
> Douglas v. State of Alabama (1965) 380 U.S. 415, 85 S. Ct. 1074.

Appellant insisted on more than one occasion that he wanted to confront and cross-examine the witnesses against him. His reasons for such insistence must have been precisely the reasons set forth in Mattox. Use of the transcript deprived petitioner of his right to have Coletsos "stand face to face" with the trier of fact and to have the trial judge make an independent judgment, after cross-examination, as to whether Coletsos was "worthy of belief."

The trial judge, had he seen Coletsos under cross-examination, might well have pondered his credibility. Coletsos' story was incredible, unless petitioner was insane at the time the offense was committed. Coletsos stated that he had never laid eyes on petitioner or his wife; yet he said that he did not provoke an attack, but that petitioner for no reason

kicked him and followed him with a knife. Coletsos was so frightened, he testified, that following the kicking he went to his room to get a hammer and had the hammer in his hand at the time of petitioner's alleged knife attack. Either petitioner was insane at the time, in making an unprovoked assault on a total stranger, or Coletsos was lying. The defense of insanity is also suggested by the testimony of petitioner's wife as to his "black-outs" and by her query to Officer Finnegan after she was stabbed, allegedly by petitioner, "How is Bill?" The possibility that Coletsos was lying as to who was the aggressor is also suggested by the inconsistency of his testimony as to when he obtained his hammer and petitioner obtained his knife. Cross-examination, even by petitioner representing himself, might well have established either self-defense or his lack of criminal intent by reason of insanity.

Even if the transcript was not formally admitted, Coletsos' prior testimony--with which the trial court apparently was familiar--was used by respondent to cross-examine Officer Finnegan (R.T.39), and was before the trial court in that posture.

Without the transcript of preliminary hearing, the remaining evidence consists of the arresting officer's testimony and respondent's involuntary confessions, and his equally inadmissible trial testimony.

The arresting officer was Officer Finnegan,

who did not see appellee actually strike Coletsos and who knew nothing as to how the struggle began or who was the aggressor.

It is manifestly impossible for the trier of the facts to isolate from the mass of improperly admitted and highly prejudicial evidence the bare facts of the brief episode witnessed by Officer Finnegan. It cannot, therefore, be said that no miscarriage of justice resulted from the improper admission of evidence.

California Constitution Art. VI, §4-1/2;

People v. Burness (1942) 53 Cal. App. (2d) 214.

II

The District Court Correctly Ruled that Appellee Had a Right to Be Warned that He Need Not Testify.

The State appears to argue that there is no federal constitutional duty on a State trial judge to warn an unrepresented criminal defendant that he need not take the stand, and that even if there is such a duty, the requirement cannot be applied retroactively. Both arguments are without foundation, and, in addition, the second is raised for the first time on this appeal.

1. Appellee had a constitutional right to be warned that he need not testify.

Appellant does not dispute that a defendant in a state criminal prosecution must be warned of his constitutional right not to take the stand. Rather, the State argues that the

cases cited by the District Court do not support such a right. (Appellant's Brief, pp. 15-16.) The State's tactic of thus failing to admit what it will not deny is at the least misleading and exhibits an exceedingly narrow view of what constitutes substantiating authority.

It is hard to see why a defendant should on the one hand have a right to be warned that he need not testify before a grand jury (U.S. v. Luxemberg (C.A. 6, 1967) 374 Fed. (2d) 241, 246), or in a trial for criminal contempt (Cliett v. Hammonds (C.A. 5, 1962) 305 Fed. (2d) 565, 570), while on the other hand he should not have that right at a trial for assault with intent to commit murder. A grand jury proceeding is more informal and arguably less inherently coercive than a formal trial (U.S. v. Cleary (C.A. 2, 1959) 265 Fed. (2d) 459, cert. den. (1959) 360 U.S. 936), so that if the warning must be given there, it would seem to follow a fortiori that it must be given at the trial itself. California of course has decided the issue as a matter of State law in favor of requiring the warning.

People v. Glaser (1965) 238 Cal. App. (2d) 819;

People v. Kramer (1964) 227 Cal. App. (2d) 199;

Killpatrick v. Superior Court (1957) 153 Cal. App. (2d) 146.

The United States Supreme Court has dealt with the same question as a matter of Federal Constitutional law in Carnley v. Cochran (1961) 369 U.S. 506 (discussed more fully in Section II, 2. infra).

In any event, it would be anomalous at this late date, when the right to such warnings has been extended to all phases of the criminal case, if the right to be warned were withheld during the trial itself. The direction of the law in recent years has been to extend procedural guarantees from the "mansion" of the courtroom to the "gatehouse" of the police station, not to roll them back.

> See Kamisar, "Equal Justice in the Gatehouses and Mansions of American Criminal Procedure," in Criminal Justice in Our Time (1965).

2. There is no retroactivity issue in this case.

The State's contention that this right, of an unrepresented defendant to be warned before he testifies, is not retroactive is based on the erroneous idea that the right is derived solely from Malloy v. Hogan (1964) 378 U.S. 1. However, both the United States Supreme Court in Carnley v. Cochran, supra, and the California Court of Appeals in Killpatrick v. Superior Court, supra, had considered and ruled on this question before appellee's conviction became final in 1962. There is thus no retroactivity issue in this case.

In Carnley, the U.S. Supreme Court in a habeas corpus proceeding reversed conviction on the following facts: An illiterate man was tried in a Florida court, without counsel, and was convicted of child molesting. While the defendant was advised that he need not testify, he was not told what consequences might follow if he did testify. He chose to

testify and, as here, his criminal record was brought out on cross-examination. That case is similar to the instant case in demonstrating the need for counsel, but here, unlike Carnley, appellee was not even advised of his right to remain silent. In passing on the question of the right of an unrepresented defendant to be warned of the possible consequences if he testified, the Court said:

> "Despite the allegation in respondent's return 'that the petitioners were carefully instructed by the trial court with regard to the rights guaranteed by both the Constitution of Florida and the Constitution of the United States.., 'it appears that, while petitioner was advised that he need not testify, he was not told what consequences might follow if he did testify. He chose to testify and his criminal record was brought out on corss-examination. For defense lawyers, it is commonplace to weigh the risk to the accused of the revelation on cross-examination of a prior criminal record, when advising an accused whether to take the stand in his own behalf; for petitioner, the question had to be decided in ignorance of this important consideration." Id. at 511.

Here appellee, who was in the same helpless position, was not warned of either his right not to testify or of the consequences of his testifying, and here, too, appellee's prior record came out during his testimony.

In Killpatrick v. Superior Court, supra, decided in 1957, the petitioner was also an unrepresented defendant who had been convicted partly on the basis of testimony he gave without being warned of his right not to testify. The Court in that case reversed the conviction, stating:

> "The privilege [against self incrimination] cannot be made truly effective unless the defendant in a criminal case who is not represented by counsel is advised by the Court of the existence of the privilege whenever such advice appears to be necessary." Id. at 149.

Citing and quoting People v. O'Bryan, (1913) 165 Cal. 55, 62, the Court then ruled that since the defendant had not been represented and was not warned, his testimony could not be considered "in any fair sense voluntary."

Thus both federal and state law prior to 1962 had resolved the problem of the unrepresented defendant who is not warned of his right not to testify and retroactivity is not properly an issue in this case.

3. Appellant is precluded from arguing that the right to such warnings is not retroactive.

Assuming, arguendo, that Malloy v. Hogan, supra, is the sole source of an unrepresented defendant's right to be warned of his right not to testify, the non-retroactivity of Malloy cannot be raised on this appeal.

For the first time on this appeal, the State presses the point that the rule that failure to warn an unrepresented defendant at trial of his right not to testify should be applied prospectively only. Tehan v. Shott, 382 U.S. 406, on which appellant relies, was decided on January 18, 1966. This was before the appeal to this Court from denial of the 1966 writ of habeas corpus; before respondent's petition to the

California Supreme Court; and of course long before the District Court wrote the opinion to which appellant now takes exception. "[E]xcept when necessary to prevent a manifest miscarriage of justice, . . . an appellant may not urge as a ground for reversal a theory which he did not present in the trial court."

Chester v. California (C.A. 9, 1965) 355 Fed. (2d) 778, 781;

Davis v. California (C.A. 9, 1965) 341 Fed. (2d) 982, 986;

Flemings v. Wilson (C.A. 9, 1966) 365 Fed. (2d) 267.

Appellant makes no showing here, nor could it show, that it must be permitted to press its retroactivity contention in order to obviate a manifest miscarriage of justice. Indeed, a reading of this trial transcript reveals a shocking series of procedural abuses of an unrepresented defendant, as more particularly set out in part III of this brief, infra. If anyone was the subject of a miscarriage of justice in this case, it certainly was not the State.

Moreover, the issue of retroactivity itself is not nearly so clear as appellant contends. The mere fact that the no-comment role of Griffin v. California (1965) 380 U.S. 609 is not retroactive (see Tehan, supra) does not mean that failure to warn an unrepresented defendant is not retroactive. "[R]etroactivity or nonretroactivity of a rule is not automatically determined by the provision of the constitution on which the dictate is based."

Johnson v. New Jersey, 384 U.S. at 728.

Compare Gideon v. Wainright (1963) 372 U.S. 335 (retroactive) with Escobedo v. Illinois (1964) 328 U.S. 478 (non-retroactive).

In weighing whether to apply a given rule retroactively or prospectively, the courts consider essentially three factors:

(1) Whether the new rule affects the question of guilt or innocence: (2) the reliance placed upon prior decisions; and (3) the effect retroactivity would have upon the administration of justice.

As to the first factor, certainly the testimony of an unrepresented, unwarned defendant, whose competence at the time of the alleged offense and whose mental stability at the time of trial are both in grave doubt, cannot form a reliable basis for a judgment on the basis of guilt or innocence.

Neither lower court reliance on past decisions nor effect on administration of justice is persuasive here since there is, as the District Court noted, a dearth of decisional authority on the point whether warnings are required, and since, as the District Court also noted, the situation here presented is unlikely to recur often (Op. p. 5).

III.

The Entire Proceeding From the Arrest to the Conviction Was Permeated with Such Unfairness as to Call into Question the Very Integrity of the Fact-Finding Process and Thus to Require a Finding that Appellee was Deprived of Due Process of Law.

Although appellant's brief and the District Court's order focus on two central issues, these issues can be fully understood only against the background of proceedings which constitute in many other ways a serious miscarriage of justice.

1. Petitioner Was Denied Representation by Counsel.

The District Court hinted at one of these problems when it indicated that, "The record presents a close question concerning the waiver of petitioner's right to counsel." Op. p. 6.)

A. Appellee did not waive counsel.

Petitioner, following his purported waiver of counsel, requested the assistance of the Public Defender. While requesting legal assistance, he stated, "I want to represent myself, because the Public Defender did not do a good job at the preliminary examination." When the trial judge suggested that he should accept counsel anyway, the Public Defender present said, "We don't want him, Judge." On the facts, this is no waiver. Petitioner was quite aware of his own inability to defend himself and so stated to the Court; yet the Court made no inquiry as to why petitioner felt he would not receive adequate representation by the Public Defender, no inquiry as to why the Public Defender did not want to represent him, and made no response to petitioner's request for assistance of counsel, either by requiring the Public Defender to advise him without representation or by suggesting a change in the Deputy Public Defender assigned to the case, or by assisting petitioner to find counsel outside the Public Defender's office.

In the absence of any inquiry into, or exploration of, the relationship between petitioner and the Public Defender's

office, and in the light of petitioner's request for legal assistance, the records suggest nothing more than a falling out between the client and a particular lawyer, that is, the Deputy Public Defender who had been representing him. The record does not support a finding of waiver.

B. There is no evidence of "an intelligent and competent waiver" of counsel.

At no time did the trial judge perform the duty imposed on him by petitioner's constitutional right to be represented by counsel, a right which "invokes of itself the protection of a trial court in which the accused--whose life or liberty is at stake--is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether it is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

Johnson v. Zerbst (1938) 304 U.S. 458 58 S. Ct. 1019;
Fay v. Noia (1963) 372 U.S. 391, 83 S. Ct. 822
People v. Mattson (1958) 51 Cal. (2d) 777.

Discharge of this "protecting duty" requires "a penetrating and comprehensive examination of all of the circumstances under which a plea is tendered" including inquiry into the background of the accused and an explanation to him by the Court of the procedural problems and of "the nature of the

charges, the statutory offenses included within them, the range of allowable punishments thereunto, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."

Von Moltke v. Gillies (1948) 332 U.S. 708, 724; 68 S. Ct. 316.

The trial transcript makes it clear that petitioner required the services of counsel in protecting his rights and in formulating and presenting the defenses available and that he himself had no knowledge as to court procedure or any real understanding of what was happening during his trial.

That petitioner required the trial court's protection became clear immediately following his purported waiver at the time of arraignment. He did not know that he was entitled to a jury trial. Despite the purported waiver, he asked the help of the Public Defender. He thought that there was some other procedural stage to be gone through prior to a jury trial. He understood nothing of the discussion as to submission of his case on the transcript of the preliminary hearing (a matter which will be dealt with further below). He understood nothing of the possible defenses available, especially insanity, and thus failed to offer proof of or even to assert such a defense.

There was no intelligent acquiescence or participation by petitioner in anything that was done during the course of his trial. He had no knowledge and no understanding and the

and the trial judge gave him no help.

In Carnley v. Cochran (1961) 369 U.S. 506, 82 S.Ct 884, the Supreme Court in a habeas corpus proceeding reversed conviction on the following facts: An illiterate man was tried in a Florida court, without counsel, and was convicted of child molesting. The record was silent as to waiver of counsel but clearly showed that he was incapable of conducting his own defense. While petitioner was advised that he need not testify, he was not told what consequences might follow if he did testify. He chose to testify, and, as here, his criminal record was brought out on his cross-examination, illustrating the need for counsel. There, as here, the accused made no objection to questions asked of him or of other witnesses; there, as here, the accused was unable to conduct any cross-examination worthy of the name.

That case is in these and other respects very similar to the instant case in that the need for counsel was clear. And here, unlike Carnley, petitioner was not advised by the trial judge of his right to remain silent and of the possible consequences if he testified.

Also of interest is Patton v. State of North Carolina (CA 4, 1963) 315 F. 2d 643, a habeas corpus proceeding. The accused, like this petitioner, was dissatisfied with his attorney and refused to be represented by him. The trial court, after giving the accused another opportunity to find an attorney, proceeded to trial without defense counsel. The court, in

reversing and remanding, said:

> ". . . even where the defendant purports to waive right to counsel and even though disclaimer of desire for counsel is expressly and unequivocally made, if the defendant shows that such disclaimer was not made intelligently and understandingly, or that it was made as the result of any coercion, such disclaimer will not be given effect as a waiver of the constitutional right to counsel."

The proper standard for discharge of the court's "protecting duty" is illustrated by People v. Shields (1965) 232 C.A. (2d) 716, where, as here, a serious conflict arose between the public defender and the accused. In Shields, however, unlike the instant case, the trial judge explored with the defendant, on the record, the differences between him and the public defender, the possibility of retaining other counsel, and the defendant's understanding of trial procedure, and there found and stated on the record, "Apparently you don't know how to handle a case." The trial judge refused, therefore, to relieve the public defender of his duties as the accused's counsel. The Appellate Court held there was no abuse of the court's discretion, stating (at pages 722-723):

> "It is apparent from defendant's general demeanor and his response to the court's questions that he could not make a competent, intelligent and complete waiver of his right to counsel, and that he was not competent to represent himself at the trial.
>
> . . . . . .
>
> "If the court does not believe that an indigent defendant is entitled to a change of attorneys, he must proceed with the

> attorney assigned to him or waive his right to counsel and represent himself. Even the alternative is subject to court supervision, and before permission to do so is granted, the court is duty bound to determine whether the defendant is making an intelligent and competent waiver."

Here, the trial transcript establishes that the trial court made no determination of "intelligent and competent waiver" and that none was possible because, as in Shields, the accused did not "know how to handle a case."

2. Appellee's Involuntary Post-Arrest Admissions Cannot Be Used Against Him.

Appellee was interrogated twice while in police custody, within a short time following his arrest. Just preceding questioning, he had been apprehended by police while he was in a frenzied and irrational state. The officers stated that he was "cursing and screaming." The testimony shows that he had just drunk almost three bottles of wine, which combined with pills taken to control intense head pains to produce a state characterized as a "blackout"; that he had had a number of episodes of this nature which affected him as if there was a "ball of red hot iron" in the back of his head, due partly to a prior injury; that he was accused of committing acts of violence, with no motive or apparent reason for the acts discernible from the record; that he had never before committed an act of violence; that according to police testimony his state was such that, without capacity to assess the consequences, he stated that he "would like to have gotten one of them too;" and that his mind

had been a "blank" from the time he left his hotel room until he found himself in police custody. There was also testimony that extreme force had been used against him by the police officers. Yet, obvious as his condition was from the record, these incriminating statements were used against him at the preliminary hearing and at the trial.

Admissions elicited in a proceeding that is accusatory in nature and is for the purpose of obtaining incriminating statements, are involuntary in the legal sense and therefore inadmissible, where made at a time when the person lacked the mental capacity to understand the meaning, effect and intention of his words, when the responses were not freely and voluntarily given, or when he was mentally deranged to the extent that he was unable to distinguish between right and wrong.

Miranda v. Arizona (1966) 384 U.S. 436, 86 S. Ct. 1602;
Townsend v. Sain (1962) 372 U.S. 293, 83 S. Ct. 745;
Fikes v. Alabama (1957) 352 U.S. 191, 196, 85 S. Ct. 828;
People v. Farrington (1903) 140 Cal. 656;
People v. McCagnan (1954) 129 Cal. App. (2d) 100, 276 P.2d 679;
People v. Aguilar (1934) 140 Cal. App. 87, 35 P.2d 137, 142.

The substantive tests of voluntariness have become increasingly meticulous through the years.

Johnson v. New Jersey (1966) 384 U.S. 719, 86 S. Ct. 1772;
Reck v. Pate (1961) 367 U.S. 433, 81 S. Ct. 1541.

It is now axiomatic that the petitioner's rights were violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity.

Rogers v. Richmond (1961) 365 U.S. 534, 544, 81 S. Ct. 735.

This is so even if there is ample evidence aside from the confession to support the conviction.

Malinski v. N.Y. (1945) 324 U.S. 401, 404, 65 S. Ct. 781

This rule applies to State as well as Federal courts.

Malloy v. Hogan (1964) 378 U.S. 1, 84 S. Ct. 1489.

Voluntariness is not conclusively established by a showing that petitioner's words were coherent.

Townsend v. Sain, supra, 372 U.S. at 320.

In petitioner's case we are not dealing with mere intoxication, such that his words might be admitted into evidence for their weight and credibility. As pointed out, the alcohol, head pain due to a pre-existing injury, and pain pills affected his mind to the point of "blackout," of complete irrationality. The alleged admissions were also elicited, as is conceded by both officers testifying at the trial, in response to questioning of an accusatory nature, while petitioner was in police custody and with no showing that he had been advised of his right to

counsel or of his absolute right to remain silent. The adversary system of criminal proceedings commences when the accused is first subjected to police interrogation.

Miranda v. Arizona, supra.

The fact that the petitioner was not advised of his right to remain silent or of his right respecting counsel at the outset of the interrogation is a significant factor in considering the voluntariness of the statements later made, and gives added weight to the other circumstances which made his admissions involuntary.

Davis v. North Carolina (1966) 384 U.S. 737, 86 S. Ct. 1761;

Maynes v. Washington (1962) 373 U.S. 503, 510-11, 83 3. Ct. 1336;

Spano v. N. Y. (1959) 360 U.S. 315, 79 S. Ct. 1202.

Petitioner at the time of his questioning had no counsel to protect him from mindless and incriminating admissions; nor did he have counsel at the trial to assess the quality and admissibility of these responses and to make proper objections to their introduction. There was no opportunity at the trial level to litigate the issue of voluntariness of the admissions, since, as pointed out above, petitioner was not aware of the procedural safeguards available to him.

The Supreme Court in Jackson v. Denno (1964) 378 U.S. 368, 84 S. Ct. 1447, has held that the inadmissibility of involuntary confessions is to be given retroactive effect and a

conviction is subject to collateral attack in cases final before that case was decided, because the persuasiveness and yet the untrustworthiness of such evidence "affect the very integrity of the fact-finding process."

See also:

Linkletter v. Walker (1965) 381 U.S. 618, 85 S. Ct. 1731.

CONCLUSION

Numerous errors were committed at the trial which could not have been committed had appellee been represented by counsel. These errors include the admission of the transcript of the preliminary examination, improper questioning by the trial judge as to prior criminal charges which elicited a prejudicial response, and the failure of the prosecution to produce the key witness against petitioner, and this in the face of petitioner's explicit request for his production.

The fact that petitioner had no trial counsel made impossible, under the circumstances, an effective or even an

adequate defense covering all possible defenses and protecting all established rights.

The trial judge failed to advise petitioner of his right not to testify and all the possible dangers inherent in his testifying, and petitioner's testimony was in many respects harmful to his defense.

Petitioner's admissions elicited at his post-arrest questioning, while in a state of virtual unconsciousness induced by alcohol, pills, intense pain, and frenzied emotion, were admitted in evidence against him during the preliminary examination and at the trial.

The trial judge throughout made no effort to assist petitioner or to advise him on vital procedural rights which a layman could not have been expected to know.

Under all of these circumstances, the evidence is unreliable and the judgment of conviction based thereon is in grave doubt.

Linkletter v. Walker (1965) 381 U.S. 618, 85 S. Ct. 1731;
Carnley v. Cochran (1961) 369 U.S. 506, 82 S. Ct. 884;
Betts v. Brady (1942) 316 U.S. 455, 62 S. Ct. 1252;
Powell v. Alabama (1932) 287 U.S. 45, 53 S. Ct. 55;
Gideon v. Wainwright (1963) 372 U.S. 335.

When examined by current State and Federal constitutional standards, nothing remains of the evidence against petitioner.

It cannot be said that no miscarriage of justice resulted from any of the errors committed during petitioner's

trial. All of such errors and each of them were harmful.

Chapman v. California, supra;

People v. Burness (1942) 53 Cal. App. (2d) 214;

California Constitution Art. VI, §4-1/2.

For the foregoing reasons, the judgment below should be affirmed.

Dated: AUG 13 1968

Respectfully submitted,

TREUHAFT, WALKER & BURNSTEIN

By _____
Doris Brin Walker

_____
Ralph Johansen
Attorneys for Appellee

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILLIAM J. BOWIE, Petitioner, vs. LAWRENCE E. WILSON, WARDEN, California State Prison, San Quentin, California, Respondent.	No. 43441

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, William J. Bowie, presently incarcerated at San Quentin Prison, brings this petition for a writ of habeas corpus. On February 10, 1961, he was convicted of assault with a deadly weapon. This court denied a petition for a writ of habeas corpus on January 18, 1966. That order was vacated on February 15, 1967, by the Court of Appeals, and petitioner was given an opportunity to exhaust available state remedies. That he has done, and the petition is now again before this court.

CONFRONTATION OF WITNESSES.

At petitioner's trial, the prosecution offered into evidence the transcript of the preliminary hearing. The testimony of Peter Coletsos, the putative victim of one of petitioner's alleged assaults, was, if not vital, important to the prosecution's case. He did not appear at trial.

Petitioner submits that he was denied his sixth amendment right to confront and cross-examine the witness at the trial. It is not disputed that petitioner was represented by counsel at the preliminary hearing and that Mr. Coletsos was there cross-examined. Counsel, at the preliminary hearing, was not ineffective. The sole question for decision, then, is whether the prior recorded testimony was properly admitted, given the showing made concerning the witness' availability for trial.

The answer is no.

The defendant's right to confront and cross-examine witnesses against him is an important one, guaranteed by the sixth and fourteenth amendments. Pointer v. Texas, 380 U.S. 400, 403-404 (1964). Whether or not cross-examination is the greatest engine of truth ever devised, it is one important method of fact-finding. The defendant's right thereto must not be dismissed lightly.

The reasonable and orderly administration of criminal justice, however, does necessitate that there be some instances when a person may not be required to be in attendance as a prerequisite to the admission of evidence. Pointer, supra at 407, cites the example of a dead declarant. Pointer was a case of a declarant beyond the reach of the forum state.

At the trial of William Bowie, virtually no showing of unavailability was made. The prosecution attempted to subpoena the witness and he did not appear (RT 44). That showing alone is constitutionally inadequate.

The court is aware that petitioner, through counsel, did cross-examine the witness at the preliminary hearing. That fact does not excuse the state from producing the witness at trial if it can. Observation of a witness' demeanor during direct and cross-examination is one way of judging

credibility and of sorting out conflicting evidence. To fail to produce an available witness jeopardizes the very integrity of the fact-finding process, even where prior cross-examination has been had. Failure to produce an available witness also runs counter to the constitutional abhorrence of secret proceedings and witnesses.

No showing was made that the court could not, after a brief continuance, procure the attendance of the witness. A continuance would not have burdened the court, for no jury was involved. No inquiry was made whether the witness could be produced. The record attests to the fact that there was not any showing of the due diligence of the prosecutor in attempting to find the witness. The judge made no inquiry concerning the witness' availability. Rather, the following proceeding took place without a hesitation:

> MR. FLOYD: We attempted to subpoena Mr. Coletsos, your Honor. He's not in Court this morning.
>
> THE COURT: You want to testify, don't you?
>
> THE DEFENDANT: I do, your Honor.
>
> THE COURT: All right.
>
> [Petitioner was then sworn and began testifying.]
>
> (RT 44-45)

Prior recorded testimony may be admitted, with no opportunity for present cross-examination, only where there has been prior confrontation and where the witness is presently unavailable. Cf., Pointer, supra; Jones v. California, 364 F. 2d 522 (9th Cir. 1966). The court need not now decide what facts constitute unavailability sufficient to admit prior recorded testimony. The court does now decide that the showing in this case was insufficient.

Respondent contends that patitioner, who was not represented by counsel at trial, waived any right to cross-examine

the witness by submitting the matter on the transcript and by not objecting to its being admitted into evidence. This court, after carefully reviewing the record, finds respondent's argument without merit.

The waiver of the right to cross-examine a witness must be voluntary, intelligent, and personal. Brookhart v. Janis, 384 U.S. 1 (1966). The record does not support any argument of waiver. For example:

> MR. MAURER: Would you want to submit the matter on the transcript?
>
> MR. DRESOW [a public defender present, but not representing petitioner]: Oh, don't take advantage of him that way. He doesn't understand that. . . .
>
> THE COURT: Why don't you, why don't you let the Public Defender --
>
> MR. DRESOW: We don't want him, Judge, but I don't want him taken advantage of.
>
> (RT 1-2)

And the following week:

> THE CLERK: The matter of William Bowie, for decision.
>
> He had waived a jury trial and submitted it on the transcript.
>
> THE DEFENDANT: Yes.
>
> . . . .
>
> THE COURT: . . .
>
> You want a hearing now, is that right?
>
> THE DEFENDANT: Yes.
>
> (RT 6)
>
> THE COURT: Did you submit the case on the transcript? Did you intend that I read this transcript and make a decision from that, or did you want to testify?
>
> THE DEFENDANT: Your Honor, I want the witnesses present, with the Court's approval, to question them, to have the privilege of cross-examining them, and let the Court decide the matter after that.
>
> THE COURT: Very well.
>
> (RT 31)

The transcript was improperly admitted into evidence in derogation of petitioner's sixth amendment right. Because of the damaging nature of the testimony, this court cannot say that the error was harmless. Quite the contrary is true -- it was prejudicial and harmful.

RIGHT TO BE WARNED OF RIGHT NOT TO TAKE THE STAND.

Petitioner was not represented by counsel at trial. He took the stand and testimony in the nature of impeachment was elicited (RT 47-48). Petitioner argues that an unrepresented defendant in a state criminal prosecution must be warned by the judge of his constitutional right not to take the stand and of the consequences that might follow should the defendant elect to do so.

There is a dirth of decisional law on point, probably because the period during which warnings of constitutional rights have been required has coincided with an expanding right to counsel. In any event, this court holds that a trial judge must explain, to an unrepresented defendant, his right not to take the stand. An unknown right might just as well be no right at all. As in Miranda v. Arizona, 384 U.S. 436 (1966), where the inherently coercive nature of station-house interrogation necessitates warnings of fifth amendment rights, and the appointment of counsel to effectuate them, a trial can be similarly inherently coercive. If a defendant is not warned of his right and of the consequences of taking the stand, he might feel compelled to testify -- " 'to tell my side of the story' . . . oblivious to the procedural consequences of such a step." Comment, Criminal Waiver, The Requirements of Personal Participation, Competence and Legitimate State Interest, 54 Calif. L. Rev. 1262, 1270, 1293 n. 215 (1966).

This court is satisfied that the federal constitution required a warning and explanation of consequences. The failure to give them was error. The court further finds that the error was not harmless beyond a reasonable doubt or non-prejudicial.

The court observes that since Bowie's trial, California courts have settled the issue, at least as a matter of state law -- the warning must be given. People v. Glasser, 238 Cal. App. 2d 819 (1965); People v. Kramer, 227 Cal. App. 2d 199 (1964). Neither California case squarely rests on the federal constitutional ground or on the efficient-administration-of-state-criminal-justice argument.

Federal courts have decided similar cases. E.g., United States v. Luxemberg, 374 F. 2d 241 (6th Cir. 1967) (defendant testifying before grand jury, must be advised of fifth amendment rights); Cliett v. Hammonds, 305 F. 2d 565, 570 (5th Cir. 1962) (error not to give warning of privilege against self-incrimination); Kershner v. Boles, 219 F. Supp. 9 (N.D. W. Va. 1963) (state defendant who was asked about prior convictions which could aggravate sentence must be warned as to effect of answer and of right to remain silent).

WAIVER OF RIGHT TO COUNSEL;
VOLUNTARINESS OF CONFESSION.

The record presents a close question concerning the waiver of petitioner's right to counsel. Defendant may have known exactly what he was doing and may have not desired association with the public defender's office. Alternatively, he may have expected some limited assistance, cooperation or coordination with the public defender's office. However, in view of the court's rulings above, the question need not be decided, for should the state re-try defendant, at that time the defendant-petitioner may choose to waive counsel or he

may not. The state court will determine the facts at that time. What happened at the last trial will be irrelevant.

A similar observation is appropriate concerning the voluntariness of petitioner's confession. At a new trial, the state court will be able to determine for itself whether the confession is admissible. The present record alone may indicate that it is, but on retrial petitioner may be able to present additional facts indicating otherwise.

ORDER.

IT IS ORDERED that a writ of habeas corpus be issued and that petitioner be released from the custody of the respondent.

Execution of this order is stayed for twenty (20) days pending the filing of a notice of appeal by respondent, who may apply for a further stay in the event the appeal is filed.

Dated: November 17, 1967

ALFONSO J. ZIRPOLI
United States District Judge